

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS LESTER FURY, JR.,

Plaintiff,

Case No. 3:17-cv-00229-LRH-WGC

ORDER

V.

NANCY A. BERRYHILL,
Acting Commissioner of
Social Security,

Defendant.

Before the court is Plaintiff's application to proceed in forma pauperis (IFP) and complaint. (ECF Nos. 1, 2-1.)

I. APPLICATION FOR LEAVE TO PROCEED IFP

A person may be granted permission to proceed IFP if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915; *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that this provision applies to all actions filed IFP, not just prisoner actions).

In addition, the Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1. "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (quoting *Jefferson v. United States*, 277 F.2d 823, 725 (9th Cir. 1960)). A litigant need not "be absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont De Nemours & Co.*, 335 U.S. 331, 339 (1948).

1 A review of Plaintiff's application reveals that he is unable to pay the filing fee. As a
2 result, Plaintiff's application to proceed IFP (ECF No. 1) is granted.
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II. SCREENING

4 28 U.S.C. § 1915 provides: "the court shall dismiss the case at any time if the court
5 determines that...the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon
6 which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune
7 from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). This provision applies to all actions filed in
8 forma pauperis, whether or not the plaintiff is incarcerated. *See Lopez v. Smith*, 203 F.3d 1122,
9 1129 (9th Cir. 2000) (en banc); *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per
10 curiam).

11 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
12 provided for in Federal Rule of Civil Procedure 12(b)(6), and this court applies the same
13 standard under Section 1915(e)(2)(B) when reviewing the adequacy of the complaint or amended
14 complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (citation omitted). Review
15 under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,
16 232 F.3d 719, 723 (9th Cir. 2000).

17 In reviewing the complaint under this standard, the court must accept as true the
18 allegations of the complaint, *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740
19 (1976), construe the pleadings in the light most favorable to plaintiff, and resolve all doubts in
20 the plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Allegations in pro se
21 complaints are held to less stringent standards than formal pleadings drafted by lawyers, and
22 must be liberally construed. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404
23 U.S. 519, 520-21 (1972) (*per curiam*); *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011).

24 A complaint must contain more than a "formulaic recitation of the elements of a cause of
25 action," it must contain factual allegations sufficient to "raise a right to relief above the
26 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
must contain something more...than...a statement of facts that merely creates a suspicion [of] a
legally cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and*

1 Procedure § 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state "enough facts
2 to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556
3 U.S. 662, 678 (2009).

4 A dismissal should not be without leave to amend unless it is clear from the face of the
5 complaint that the action is frivolous and could not be amended to state a federal claim, or the
6 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
7 1103, 1106 (9th Cir. 1995) (dismissed as frivolous); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th
8 Cir. 1990).

9 Plaintiff's complaint names Nancy Berryhill, Acting Commissioner of Social Security,
10 and requests review of the Commissioner's final decision. (ECF No. 2-1.)

11 Federal courts have sole jurisdiction to conduct judicial review of the Social Security
12 Administration's determination in this regard. *See 42 U.S.C. § 405(g)*. Upon a review of
13 Plaintiff's complaint, it appears he has exhausted his administrative remedies with the Social
14 Security Administration. Therefore, Plaintiff's complaint shall proceed.

15 **III. CONCLUSION**

16 (1) Plaintiff's application to proceed IFP (ECF No. 1) is **GRANTED**. Plaintiff is
17 permitted to maintain this action without the necessity of prepayment of fees or costs or the
18 giving of security therefor. This order granting IFP status does not extend to the issuance of
19 subpoenas at government expense.

20 (2) The complaint shall **PROCEED**. The Clerk is instructed to **FILE** the complaint (ECF
21 No. 2-1).

22 (3) The Clerk shall **SERVE** the Commissioner of the Social Security Administration by
23 sending a copy of the summons and complaint by certified mail to: (1) Office of the Regional
24 Chief Counsel, Region IX, Social Security Administration, 160 Spear St., Suite 899, San
25 Francisco, CA 94105-1545; and (2) the Attorney General of the United States, Department of
26 Justice, 950 Pennsylvania Avenue, N.W., Room 4400, Washington, D.C. 20530.

27 (4) The Clerk shall **ISSUE** a summons to the United States Attorney for the District of
28 Nevada and deliver the summons and a copy of the complaint to the U.S. Marshal for service to

1 the U.S. Attorney's Office at 100 West Liberty Street, Suite 600, Reno, Nevada 89501.
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3 (5) Henceforth, Plaintiff, or counsel, shall serve upon the defendant, or the defendant's
4 attorney, a copy of every pleading, motion, or other document submitted for consideration by the
5 court. Plaintiff shall include with the original paper submitted for filing a certificate stating the
6 date that a true and correct copy of the document was mailed to defendant or defendant's
7 counsel. The court may disregard any paper received by a district judge, magistrate judge, or
8 clerk which fails to include a certificate of service.

9 **IT IS SO ORDERED.**

10 DATED: April 17, 2017.

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12 WILLIAM G. COBB
13 UNITED STATES MAGISTRATE JUDGE
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